

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JAMES W. DIAMOND
and
LISA ANNE DIAMOND

CASE NO. 89-00664

Debtors

APPEARANCES:

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STEPHEN D. GERLING, U. S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This contested matter is before the Court by way of a motion filed by secured creditor, PMI Food Equipment, f/k/a Hobart Corporation ("PMI") seeking an order compelling Lisa Anne and James W. Diamond d/b/a Jim's Meat Market ("Debtors") to submit to an examination and produce certain documents pursuant to Bankruptcy Rule ("Bankr.R.") 2004 and also seeking extension of time to file complaints pursuant to §§523 and 727 of the Bankruptcy Code (11 U.S.C.

§§101-1330)("Code"). Argument was heard on the motion in Syracuse, New York on November 6, 1990 and the matter was finally submitted for decision on November 21, 1990.

JURISDICTION

The Court has subject matter jurisdiction over this contested matter pursuant to 28 U.S.C. §1334(b), §157(a), (b)(1) and (b)(2)(A).

FACTS

On April 18, 1989 the Debtors filed their voluntary joint petition for relief under Chapter 13 of the Code. Their Chapter 13 plan was confirmed by Order dated October 11, 1989.

Prior to filing, on or about March 25, 1987, Debtor James W. Diamond d/b/a Jim's Meat Market entered into a contract with PMI (formerly Hobart Corporation) pursuant to which the Debtor promised to repay money loaned by PMI to the Debtor for the purpose of purchasing certain equipment from PMI ("Equipment").¹ In connection with the sale, the Debtor granted PMI a security interest in the Equipment identified in the contract.

Due to noncompliance with the payment terms of their confirmed Chapter 13 plan, the Debtors' case was converted to a Chapter 7 proceeding by Order of this Court dated May 24, 1990. Upon conversion of the case, PMI was notified on June 11, 1990 that the date set for the first meeting of creditors pursuant to Code §341(a) ("§341 meeting") was July 5, 1990 and that the last day to file complaints pursuant to Code §§523 and 727 was September 3, 1990.

Precipitated by Debtors' default in payment, PMI, the Chapter 7 Trustee and Debtors'

¹. The contract identified the equipment sold to the Debtor as: two GF065A-1 Fryers (natural Gas); one basket GX016, large basket; one 1841 digital scale (used), S/N 13-405-253; and one 1840 digital scale (used), S/N 15-256-798.

counsel entered into a "Stipulation For Abandonment" ("Stipulation") concerning and specifically identifying the Equipment in which PMI retained a security interest. Appended to PMI's papers is correspondence from PMI regarding the Stipulation. Included is a letter from PMI to Debtors dated June 26, 1990 in which PMI states "enclosed please find a stipulation" which had been executed by the Chapter 7 Trustee on June 22, 1990 (PMI Exhibit C). Approximately one month later another letter dated July 30, 1990 from PMI was mailed to Debtors urging the Debtors' "prompt attention" to the Stipulation (PMI Exhibit D). On August 20, 1990, Debtors' counsel sent a letter to Debtors requesting authorization to sign the Stipulation (PMI Exhibit E). Debtors' counsel finally executed the Stipulation on behalf of Debtors on August 25, 1990.²

By its Order dated September 13, 1990 the Court approved the Stipulation in which the Debtors consented to allow PMI to enforce its rights as a secured creditor and enter their premises and recover the Equipment identified in the original contract.

In attempting to physically recover the Equipment, PMI was informed on September 24, 1990 that the Debtors had sold it at sometime after the filing of their Chapter 13 petition. PMI filed its instant motion on October 12, 1990.

ARGUMENTS

PMI argues that it did not have knowledge of the Debtors' conversion of the Equipment until it was so informed by Debtors' counsel, twenty-one days after the last date for filing complaints under Code §523 or §727. It maintains that because it could not have had knowledge of the circumstances which would form a basis of a complaint until after the time for filing such

². PMI executed the Stipulation upon its receipt from the Debtors' counsel on September 4, 1990.

complaints had expired, it should be permitted to examine the Debtors and file a complaint, if appropriate.

The Debtors assert that PMI could have ascertained the disposition of its collateral if it had attended and examined the Debtors at the Chapter 7 §341 meeting held on July 5, 1990. They argue that by failing to attend the Chapter 7 §341 meeting, PMI was dilatory and consequently should not be permitted to claim prejudice by the Debtors' actions regarding the Equipment.

DISCUSSION

It is undisputed that the instant motion was filed after the bar date for filing complaints under Code §§523 and 727. It also appears that the Debtors' Chapter 7 discharge has not yet been granted.

The time for filing such complaints may be extended "for cause" pursuant to Bankr.R. 4007(c) and 4004(b), respectively, where the motion seeking extension is filed within the time to file complaints. "If the motion is not filed within that time period, the court has no discretion to grant the motion." 8 King COLLIER ON BANKRUPTCY ¶4007.05, ¶4004.03[3] (15th ed. 1990).

Notwithstanding the general rule, the bar date, i.e., the statute of limitations, for filing complaints based upon Code §523 or §727 may be tolled where the would be plaintiff could not have known of the existence of the cause of action within the statutory time limitations. "Under federal law, when the defendant fraudulently conceals the wrong, the [statute of limitations] does not begin running until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, the cause of action." Keating v. Carey, 706 F.2d 377, 382 (2d Cir. 1983) (citing Holmberg v. Armbrrecht, 327 U.S. 392, 396-97 (1946)). This doctrine of "equitable tolling" has been held to apply to the interval of time between the running of the limitations period established by

Bankr.R. 4004 and the actual entry of the debtor's discharge. Stodd v. Mufti (In re Mufti), 61 B.R. 514, 519 (Bankr.C.D.Cal. 1986). The question thus presented is whether PMI could reasonably have discovered that the Debtors had disposed of the Equipment in sufficient time to comply with Bankr.R. 4004 and/or 4007. The evidence indicates that it must be answered in the negative.

First, the Debtors' argument that PMI was dilatory by failing to attend the §341 meeting must be briefly considered. If carried to its logical conclusion, secured creditors who fail to either attend or ask the right questions at the §341 meeting are without recourse as to any subsequent misrepresentation made by the debtor regarding the collateral. Not surprisingly, the Debtors have offered no authority which would support the overriding significance of a secured creditor's failure to attend the §341 meeting which they urge here. The Court is also unaware of any such principle of law and, therefore, does not adopt the proposition urged here by the Debtor.

In the instant case, the date set for the §341 meeting was July 5, 1990. PMI sent its Stipulation to the Debtors prior to the §341 meeting, on June 26, 1990. The Debtors asserted at the November 6, 1990 argument, that if PMI would have attended the §341 meeting and examined them, they would have disclosed the disposition of the Equipment to PMI in time for PMI to commence an action to deny their discharge under Code §727. Incredibly, the Debtors argue that PMI's failure to attend the §341 meeting and ask the necessary probative questions authorized the Debtors to hold on to the Stipulation for two months before executing it, then execute same agreeing to return the Equipment which they knew they had already disposed of, and finally mail it to PMI within a few days of the bar date for filing complaints.

Thus, in the Court's view, the Debtors not only engaged in activities contrary to their obligations under the Code, but simultaneously induced PMI's reliance upon the Stipulation which knowingly misrepresented those activities, until it was too late for PMI to discover the Debtors'

activities and exercise its rights against the Debtors pursuant to Code §523 and §727. The Debtors cannot shield actions which are detrimental to a creditor and contrary to the purposes of the Code by misrepresentations and expect to be protected by the Bankruptcy Rules which are designed to insure fair play.

Therefore, the time limitations under Bankr.R. 4004 and 4007 were equitably tolled until such time as PMI was able to ascertain the disposition of their collateral. The Court finds that September 24, 1990, as alleged by PMI, was the first date it could reasonably have known of the collateral's disposition.³ Consequently, its motion filed on October 12, 1990 to extend the time to file complaints under Code §523(a)(2),(4) or (6) and Code §727(a)(2) is timely. In addition, in view of the above considerations, PMI has established "cause" for extending the time to file complaints pursuant to Bankr.R. 4007(c) and 4004(b).

In connection with said extension, PMI is entitled to examine the Debtor pursuant to Bankr.R. 2004 in order to ascertain the facts relating to the disposition of the collateral.

Based upon the foregoing reasons, PMI's motion is granted in full. Therefore, it is hereby,

ORDERED,

1. That PMI has an additional sixty (60) days from the date of entry of this order to file complaints against the Debtors pursuant to Code §523 or §727, and,
2. That the Debtors are to attend and submit to an examination upon reasonable notice pursuant to Bankr.R. 2004 to be held at the office PMI's counsel, and,
3. That Debtors are to produce at the time of the 2004 examination, all records and documentation

³. The Court will treat September 24, 1990 as the operative date upon which the sixty days provided for in Bankr.R. 4004(a) and 4007(c) begin to run.

received or prepared reflecting the sale or other disposition of the Equipment and the identity and address of any purchasers.

Dated at Utica, New York

this day of March, 1991

STEPHEN D. GERLING
U. S. Bankruptcy Judge